

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

		X
THE NEW YORK TIMES COMPANY	:	
and CHARLIE SAVAGE,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	<u>COMPLAINT</u>
U.S. DEPARTMENT OF JUSTICE,	:	
	:	
Defendant.	:	
	:	
		X

Plaintiffs THE NEW YORK TIMES COMPANY and CHARLIE SAVAGE, by their undersigned attorneys, allege for their Complaint:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to obtain an order for the production of agency records from Defendant in response to three FOIA requests properly made by Plaintiffs.

2. In the aftermath of September 11, Defendant U.S. Department of Justice (“DOJ”) played a key role in establishing new counterterrorism legal policies. The policies, which dealt with such subjects as the detention and interrogation of terrorism suspects and the expanded use of surveillance, are of significant public interest because they attempt to balance national security with the protection of civil liberties and compliance with the law.

3. The three requests at issue in this action, all brought by Plaintiffs in the last year, all address post-September 11 counterterrorism policies. In each instance, DOJ failed

to respond to the request in twenty business days as required under FOIA, 5 U.S.C. §552(a)(6)(A).

PARTIES

4. Plaintiff The New York Times Company publishes *The New York Times* newspaper and www.nytimes.com. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, New York.

5. Plaintiff Charlie Savage is a reporter for *The New York Times* and an employee of The New York Times Company.

6. Defendant U.S. Department of Justice (“DOJ”) is an agency of the federal government that has possession and control of the records that Plaintiffs seek.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

8. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

9. Plaintiffs have exhausted all administrative remedies available in regard to the three requests at issue. In each of them, Defendant has failed to make an initial determination within the time frame set by FOIA, and therefore Plaintiffs are deemed to have exhausted all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

FACTS

10. The documents sought by the three FOIA requests at issue all relate to Plaintiffs’ ongoing reporting on DOJ’s counterterrorism legal policies developed in the aftermath of September 11.

A. The Task Force Request

11. On October 28, 2015, Plaintiffs submitted a FOIA Request to DOJ (the “Task Force Request”) seeking “the final reports by the Special Interagency Task Force on Detainee Disposition established by Executive Order 13,493 and the Special Interagency Task Force on Interrogation and Transfer Policies established by Executive Order 13,491.”

12. Because of a typographical error in the original Task Force Request, Plaintiffs initially listed that the Special Interagency Task Force on Interrogation and Transfer Policies was established by Executive Order 13,493. Plaintiffs corrected the error for DOJ on January 15, 2016.

13. DOJ acknowledged the Task Force Request on January 15, 2016.

14. Also on January 15, 2016, DOJ informed Plaintiffs that DOJ was engaged in litigation with the International Counsel Bureau (“ICB”) over FOIA requests submitted by ICB (the “ICB Litigation”) and that the reports at issue in Plaintiffs’ Task Force Request were responsive to the FOIA requests in the ICB Litigation (Int’l Counsel Bureau v. U.S. Dep’t of Def. et al., 13-cv-01591 (JDB) (D.D.C. 2013)).

15. A representative for DOJ’s FOIA Office told Plaintiffs that, as a result, he thought DOJ would be able to respond to the Task Force Request by the end of January 2016.

16. In February 2016, ICB voluntarily dismissed its claims against DOJ.

17. On August 8, 2016, DOJ informed Plaintiffs that its Office of Information Policy was still processing the Task Force Request.

18. DOJ has failed to issue a response to the Task Force Request within 20 business days as required under FOIA.

B. The Rowan Memo Request

19. On January 7, 2016, Plaintiffs submitted a FOIA Request to DOJ (the “Rowan Memo Request”), seeking “the memo on discovery issues raised by Stellarwind written by Pat Rowan and dated May 4, 2005.”

20. “Stellarwind” is the code name for the U.S. Government’s warrantless wiretapping and bulk data collection program that President George W. Bush secretly authorized in the aftermath of September 11.

21. DOJ acknowledged the existence of the Rowan Memo in January 2016 when it declassified, in response to a different FOIA request by Plaintiffs, passages from the Report on the President’s Surveillance Program published by the Office of the Inspectors General of DOJ, the Department of Defense, Central Intelligence Agency, and Office of the Director of National Intelligence.

22. DOJ acknowledged the Rowan Memo Request on January 14, 2016.

23. DOJ has failed to issue a response to the Rowan Memo Request within 20 business days as required under FOIA.

C. The Bates and FBI requests

24. On May 10, 2016, Plaintiffs submitted identical FOIA requests to the Office of the Director of National Intelligence (“ODNI”) and to DOJ (respectively, the “Bates and FBI ODNI Request” and the “Bates and FBI DOJ Request”).

25. Each request sought the unreleased documents from the Foreign Intelligence Surveillance Court (“FISC”) docket for the case that resulted in Judge John Bates’s October 3, 2011 and November 3, 2011 rulings, both of which were declassified and made public in August 2013 but with their docket numbers and case names redacted.

26. The Bates and FBI ODNI Request and the Bates and FBI DOJ Request included a non-exhaustive list of the documents Plaintiffs believe still have not been released by the FISC: the April 20 and 22 submissions, including all affidavits, procedures, and any other attachments; the May 2 clarification letter; the May 5 motion for an extension of time; the May 9 orders; the June 1 submission; the June 17 follow-up questions from the court; the June 28 submission; the transcript of the July 8 hearing; the July 14 motion; the July 14 orders; the August 16 submission; the August 30 submission; the transcript of the September 7 hearing; the September 9 submission; the September 13 submission; the September 14 orders; the October 13 briefing order; the October 31 submissions; the November 22 submissions; and the November 29 notice.

27. Each request additionally sought a copy of the “Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act” that were approved by the Attorney General on October 22, 2008 and later submitted to the FISC.

28. The FBI minimization procedures were discussed by the Foreign Intelligence Surveillance Court in a November 6, 2015 opinion that ODNI declassified on April 19, 2016.

29. On May 12, 2016, DOJ acknowledged both requests. DOJ informed Plaintiffs that it would coordinate both requests, that DOJ had told ODNI that it did “not need to conduct a search for responsive records,” and that DOJ would “review process with ODNI and with agencies in the Intelligence Community.”

30. DOJ has failed to issue a response to both the Bates and FBI ODNI Request and the Bates and FBI DOJ Request within 20 business days.

COUNT I AS TO THE TASK FORCE REQUEST

31. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

32. Defendant DOJ is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

33. DOJ failed to decide the Task Force Request within the twenty business days required by FOIA, 5 U.S.C. § 552(a)(6)(A). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

34. DOJ has no lawful basis for declining to release the records requested by Plaintiffs under FOIA.

35. DOJ's failure to issue a determination in response to the request within the time set by law violated FOIA.

36. Accordingly, Plaintiffs are entitled to an order compelling DOJ to produce the documents sought by the Task Force Request.

COUNT II AS TO THE ROWAN MEMO REQUEST

37. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

38. Defendant DOJ is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

39. DOJ failed to decide the Rowan Memo Request within the twenty business days required by FOIA, 5 U.S.C. § 552(a)(6)(A). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

40. DOJ has no lawful basis for declining to release the records requested by Plaintiffs under FOIA.

41. DOJ's failure to issue a determination in response to the request within the time set by law violated FOIA.

42. Accordingly, Plaintiffs are entitled to an order compelling DOJ to produce the documents sought by the Rowan Memo Request.

COUNT III AS TO THE BATES AND FBI ODNI REQUEST
AND THE BATES AND FBI DOJ REQUEST

43. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

44. Defendant DOJ is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

45. DOJ failed to decide the Bates and FBI ODNI Request and the Bates and FBI DOJ Request within the twenty business days required by FOIA, 5 U.S.C. § 552(a)(6)(A). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

46. DOJ has no lawful basis for declining to release the records requested by Plaintiffs under FOIA.

47. DOJ's failure to issue a determination in response to the requests within the time set by law violated FOIA.

48. Accordingly, Plaintiffs are entitled to an order compelling DOJ to produce the documents sought by the Bates and FBI ODNI Request and the Bates and FBI DOJ Request.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

49. Declare that the documents sought by the Task Force Request, the Rowan Memo Request, the Bates and FBI ODNI Request, and the Bates and FBI DOJ Request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

50. Order DOJ to provide the requested documents to Plaintiffs within 20 business days of the Court's order;

51. Award Plaintiffs the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and

52. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, NY
September 8, 2016

_____/s/_____
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